

SERVED: February 24, 1993

NTSB Order No. EA-3808

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 12th day of February, 1993

|                                  |   |                 |
|----------------------------------|---|-----------------|
| _____                            | ) |                 |
| JOSEPH M. DEL BALZO,             | ) |                 |
| Acting Administrator,            | ) |                 |
| Federal Aviation Administration, | ) |                 |
|                                  | ) |                 |
| Complainant,                     | ) |                 |
|                                  | ) | Docket SE-11077 |
| v.                               | ) |                 |
|                                  | ) |                 |
| ROBERT M. SMITH,                 | ) |                 |
|                                  | ) |                 |
| Respondent.                      | ) |                 |
| _____                            | ) |                 |

**OPINION AND ORDER**

Respondent has appealed, pro se, from the oral initial decision of Administrative Law Judge Jimmy N. Coffman, rendered on December 6, 1990, at the conclusion of an evidentiary hearing.<sup>1</sup> By that decision, the law judge affirmed an emergency order<sup>2</sup> of the Administrator charging respondent with violations

<sup>1</sup>An excerpt from the hearing transcript containing the initial decision is attached.

<sup>2</sup>Respondent waived the expedited deadlines associated with

of sections 91.1(c)(3),<sup>3</sup> 91.11(a)(1), and (a)(2) of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 91).<sup>4</sup> Based on these findings and pursuant to FAR section 61.15(b)(2), 14 C.F.R. Part 61, the law judge affirmed the revocation of respondent's airman certificates.<sup>5</sup>

(..continued)  
the appeal of an emergency order.

<sup>3</sup>The Administrator's order, which served as the complaint, contained a typographical error in that it listed this regulation as 91.1(b)(3), a provision that does not exist. The order, however, described the charge in detail and clearly paraphrased section 91.1(c)(3). Respondent did not raise the issue of inadequate notice either at the hearing or in his appeal brief, and we believe no ambiguity existed regarding which regulation the order referenced.

<sup>4</sup>Section 91.1(c)(3), now 91.703(a)(3), provides, in pertinent part:

**"91.1 Applicability.**

\* \* \* \*

(c) Each person operating a civil aircraft of U.S. registry outside of the United States shall -

\* \* \* \*

(3) Except for §§ 91.15(b), 91.17, 91.38 and 91.43, comply with Subparts A, C, and D of this part so far as they are not inconsistent with applicable regulations of the foreign country where the aircraft is operated or Annex 2 to the Convention on International Civil Aviation."

Sections 91.11(a)(1) and (2) are found in Subpart A, as referenced above, and do not contradict the civil aviation regulations of the foreign country (in this case, Australia) where the alleged violations occurred.

Sections 91.11(a)(1) and (2), now 91.17(a)(1) and (2), state:

**"§ 91.11 Alcohol or drugs.**

(a) No person may act or attempt to act as a crewmember of a civil aircraft -

(1) Within 8 hours after the consumption of any alcoholic beverage; [or]

(2) While under the influence of alcohol."

<sup>5</sup>Section 61.15(b)(2) reads as follows:

After consideration of the briefs of the parties and the record below, the Board concludes that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order of revocation and the law judge's initial decision. Thus, we deny respondent's appeal for reasons set forth below.

On April 4, 1990, respondent was scheduled to serve as second officer aboard Continental Airlines Flight 15, a DC-10, from Sydney, Australia to Melbourne, Australia, slated to depart at 7:40 a.m. He was to meet the captain, first officer, and other crew members at 6:00 a.m. in the lobby of the hotel where they were all staying, at which time a shuttle bus would transport them to Sydney International Airport.

When respondent did not arrive at the designated time, according to the testimony of the captain and first officer, the first officer telephoned respondent's room but received no answer. He then went to respondent's room, knocked on the door several times, again without response. After obtaining a pass key and knocking on the door another time, the first officer entered respondent's room. He testified that respondent arose from bed, staggered, and appeared to be under the influence of

(..continued)

**"§ 61.15 Offenses involving alcohol or drugs.**

\* \* \* \*

(b) The commission of an act prohibited by [§ 91.11(a) or § 91.12(a)] of this chapter is grounds for -

\* \* \* \*

(2) Suspension or revocation of any certificate or rating issued under this part."

alcohol.<sup>6</sup> The first officer also testified that the room smelled of alcohol.

The crew subsequently left on the shuttle bus for the airport without respondent. Both the captain and first officer testified that, later at the airport, they saw respondent emerge from an elevator, evidently after he had taken a taxicab to the airport. Both men testified that respondent was belligerent, looked disheveled, had bloodshot eyes, and smelled of alcohol. Respondent walked past them and went into the cockpit of the aircraft. Based on their observations, the captain and the first officer believed that respondent was under the influence of alcohol and, as such, unfit to fly. While they were in the operations room working on delaying the flight, the captain and first officer heard radio transmissions made by respondent. They characterized his tone as belligerent. Three other Continental employees testified that they saw respondent sitting in the cockpit with his feet up on a desk and eye shades on, seemingly asleep.

Flight 15 ultimately was canceled, as a replacement for respondent could not be found. Investigators from the Australian Civil Aviation Authority, as well as local police officers, were summoned. Respondent refused to submit to a breathalyzer test to determine whether he was under the influence of alcohol. He

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<sup>6</sup>The first officer was formerly a police officer who had been trained in the observation of persons under the influence of alcohol. He testified that as a police officer, he had administered between three and four hundred breathalyzer tests.

claimed at the hearing that he refused the test because he had just gargled with Listerine and was unsure whether it would create a false positive result.<sup>7</sup> Three Australian police officers testified by deposition that respondent smelled of alcohol, had bloodshot eyes, and appeared to be under the influence of alcohol. Respondent told one officer that he had drunk two beers at about 10 p.m. the evening before. When asked why, then, did he smell of alcohol, respondent replied, "Some people have a few beers and stink and some people don't."<sup>8</sup> The officer made a written record of the conversation, asked respondent to review and sign it, but respondent refused.

Two investigations officers from the Australian Civil Aviation Authority testified by deposition that respondent was given the option of submitting to a blood or urine alcohol test and was assured that the samples would be split so that he could have them evaluated independently. Nevertheless, respondent refused to submit to the tests, stating that he was unsure of the system used in Australia to conduct such tests.<sup>9</sup> Both witnesses said that respondent appeared "well affected" by alcohol.<sup>10</sup>

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<sup>7</sup>He did not express these concerns to the police officers when they asked him to submit to a breath test.

<sup>8</sup>Deposition of Martin Hesse, p. 14.

<sup>9</sup>Respondent testified that he was "uncomfortable" taking these tests in a foreign country.

<sup>10</sup>One witness defined well affected as follows:  
"'Under the influence' to me means somebody that has consumed alcohol in whatever degree. 'Well affected' to me means somebody that would have difficulty in coordinating any operation of machinery or a motor vehicle, is in the stage where he should not

Respondent told one of these witnesses that he had drunk two beers at about midnight the night before.

Respondent's explanation for his appearance and behavior was that he had been ill all night as a result of eating bad oysters.

He claimed that he smelled of alcohol because he had spilled a bottle of beer on his uniform pants. The testimony of a friend who was in the hotel room with him corroborated these statements.

We believe that the law judge's finding of fact, contrary to respondent's argument, is supported by a preponderance of reliable, probative, and substantial evidence. Respondent claims that there was no conclusive evidence that he was under the influence of alcohol, attempted to act as a crewmember, or had consumed alcohol within 8 hours of the scheduled flight time. These arguments are spurious. Respondent arrived at the airport in his flight uniform, boarded the aircraft, and made several radio transmissions. Whether he performed all of his assigned preflight duties is unimportant. His behavior suggested that he intended to act as a crewmember of Flight 15. See Administrator v. Cook, NTSB Order No. EA-3223 (1990)(respondent reported to the airport in his uniform and checked his scheduled flight assignment while under the influence of alcohol. His actions supported a finding that he had attempted to act as a crewmember).

The evidence of respondent's alcohol consumption, as briefly  
(..continued)  
drive a motor vehicle or operate machinery." Deposition of Michael Shannon, pp. 19-20.

summarized above, is overwhelming. There is no requirement that an eyewitness to his actual imbibing of an alcoholic beverage be produced. Witnesses' observations of respondent's behavior and the pervasive odor of alcohol are sufficient to constitute substantial and direct evidence of respondent's intoxication. See Sorenson v. National Transportation Safety Board, 684 F.2d 683 (10th Cir. 1982), affirming 3 NTSB 3456 (1981). Respondent's refusal to take a breathalyzer, blood, or urine test does not preclude the conclusion that he attempted to act as a crewmember while under the influence of alcohol. The law judge entertained the testimony of all the witnesses and made a credibility assessment, which has not been shown to be arbitrary or capricious. See Administrator v. Smith, 5 NTSB 1560, 1563 (1986). The rejection by the law judge of respondent's version of events provides no ground to overturn the initial decision, given the substantial evidence introduced by the Administrator. See Administrator v. Player, 3 NTSB 3498, 3500 (1981).

Respondent's final argument is also unpersuasive. He claims that the law judge erred in refusing to admit an affidavit from a doctor detailing the symptoms of food poisoning. This affidavit was written following a telephone interview between the physician and respondent two days before the hearing and purportedly contained a description of the cause and effect of food poisoning, as well as the ultimate conclusion that respondent appeared to have suffered from that illness. Admission of this affidavit would have deprived the Administrator of the

opportunity to cross-examine the witness and to obtain an expert witness on the subject. Respondent admitted several medical textbooks into evidence describing the symptoms of food poisoning and was not prejudiced by the law judge's refusal to allow admission of the affidavit.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied;
2. The Administrator's emergency order and the initial decision are affirmed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.